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The Clinton-Gore DOL, Stuck in the 20th Century

Time to Shake Up the Labor Department?

What's the matter with the Department of Labor (DOL)? In the past few months, this 87-year-old bureaucracy has shown itself to be woefully out of touch with American workers:

- Reporters revealed an Occupational Safety and Health Administration (OSHA) policy that would devastate technology workers and parents who rely on **telecommuting**. The policy would hold employers liable for unsafe conditions and accidents in workers' home offices. Public outcry led to embarrassing retractions.
- Another DOL policy would eliminate **stock options** for blue-collar workers (white-collar stock options would be unaffected). Facing more public outcry, the Department has stated it may revise the policy.

Telecommuting and stock options are innovations that have changed the labor market to the benefit of workers. For DOL to threaten them is evidence that the Department — and particularly OSHA — is ignorant of workers' needs and often works against the very people it is supposed to help. Retracting and revising such moves is of little consolation; the Department just as easily could change its mind again tomorrow.

Part of the danger is that federal labor law is showing its age. Consider these important dates in the Department's history, including major legislation that guide its activity:

1913	Department of Labor created	1947	Taft-Hartley Act
1931	Davis-Bacon Act	1969	Coal Mine Health and Safety Act
1935	National Labor Relations Act	1970	Occupational Safety And Health Act
1938	Fair Labor Standards Act	1974	Employee Retirement Income Security Act

Each belongs to a bygone era — long before Vice President Gore invented the Internet and unleashed new opportunities for compensation and flexible workplaces. The threat to these innovations will continue to grow until Congress brings DOL into the 21st century.

Telecommuters Are Safe from OSHA — Or Are They?

When the *Washington Post* (1/4/00) uncovered a November 15, 1999, OSHA letter stating employers could be fined or sued for unsafe conditions in their employees' home offices, both employers and telecommuters panicked. However, this policy dates back to at least October 7, 1993, the first time OSHA is known to have explained the policy in a letter to an employer.

- Under the policy, employers would be responsible for bringing employees' home offices into compliance with OSHA standards regarding clutter, ergonomically correct furniture, lighting, heating, cooling, ventilation, emergency medical plans, availability of first aid kits, lead paint, asbestos, and illuminated exit signs.
- The policy opened the prospect of employers being sued for injuries or conditions that stem from at-home work. This fueled fears of dramatic increases in liability insurance premiums.
- According to the nonpartisan Employment Policy Foundation, the policy would amount to a **\$22.5 billion tax on telecommuting**, or \$1,073 per telecommuter. The group estimated the 10-year cost to be \$102 billion.
- America's 21 million telecommuters feared their homes would be invaded by OSHA, and that the cost of compliance would force employers to revoke telecommuting arrangements.
- Even the *Washington Post* labeled the policy "**antediluvian**" and "**ham-handed**" (1/6/00).

The publicity led to a backlash from workers, who understood the policy's implications better than their supposed protectors at OSHA.

Initially, OSHA defended the policy. OSHA administrator Charles Jeffress explained, "If an employer is allowing it to happen, it is covered" by OSHA regulation. The day after the story broke, Labor Secretary Alexis Herman retracted the 1999 letter but not the underlying policy, leaving all parties confused and wary. In congressional testimony dated January 25, 2000, Mr. Jeffress finally abandoned the disastrous policy and explained DOL's current position:

1. *We believe the OSH Act does not apply to an employee's house or furnishings;*
2. *OSHA will not hold employers liable for work activities in employees' home offices;*
3. *OSHA does not expect employers to inspect home offices;*

4. *OSHA does not, and will not, inspect home offices;*
5. *Approximately 20 percent of employers, because of their size or industry classification, are required by the OSH Act, to keep records of work-related injuries and illnesses. These employers continue to be responsible for keeping such records, regardless of whether the injuries occur in the factory, on the road, in a home office, or elsewhere, as long as they are work-related.*
6. *Where work other than office work is performed at home, such as manufacturing operations, employers are responsible for hazardous materials, equipment, or work processes which they provide or require to be used in an employee's home;*
7. *OSHA will only conduct inspections of hazardous home workplaces, such as home manufacturing, when OSHA receives a complaint or referral.*

OSHA has promised to send its inspectors a directive on how to follow the revised policy. Telecommuters remain wary, however, because such assurances do not settle the issue.

Although OSHA has now withdrawn the policy, the agency could re-instate it at any time. The law states employers are responsible for their employees' "place of employment," without regard to whether that place is at home or away from home (29 U.S.C. 654):

(a) Each employer —

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this chapter.

There is no protection for telecommuting because the law was written in 1970, before such a thing existed.

Obviously, OSHA does not know enough about the modern workforce to be trusted with an issue that could cripple flexible and family-friendly working arrangements. Mr. Jeffress has agreed to provide Employment, Safety, and Training Subcommittee Chairman Enzi a draft of the new policy directive. Senator Enzi has indicated he will pursue legislation if the directive does not adequately protect telecommuters.

DOL: Stock Options for the Boardroom, but Not the Mailroom

Just days after its controversial telecommuting policy came to light, DOL again came under criticism for a policy that would eliminate stock options for many — if not all — hourly employees. A DOL advisory letter dated February 12, 1999, requires employers to include the value of stock options in an employee's base pay when calculating overtime wages.

Generally, stock options allow employees to purchase their company's stock at a set price. The National Center for Employee Ownership (NCEO) estimates 7.5 million Americans work for companies that offer stock options. An NCEO spokesman explains, "They're a standard part of the compensation in the high-tech sector and they're becoming increasingly popular everywhere else" [*Pittsburgh Post-Gazette*, 1/12/00].

Under the Fair Labor Standards Act of 1938, employers must pay hourly employees "time and a half" for overtime. While portions of an employee's compensation are not included in this calculation (e.g. health insurance, discretionary bonuses, profit-sharing plans, retirement plans), DOL's advisory letter requires employers to include the value of stock options.

- Including stock options in base pay **would increase overtime costs.**
- **Calculating the additional overtime costs would be nearly impossible.** An option's value cannot be determined until the employee purchases the stock, which typically comes years after receiving the option. Employers would have to (1) wait until the option is exercised, (2) calculate the difference between what the employee paid and the market value of the stock for each option, (3) spread that amount over the life of each option for up to two years, (4) include those amounts in the employee's base pay, (5) calculate the additional overtime they must pay, (6) calculate the amount to be withheld for taxes, and (7) cut a lump sum check.
- Any errors in calculation — real or perceived — **would expose employers to prosecution and class action lawsuits.**

Many employers simply would drop stock options for hourly workers rather than face the enormous costs involved. Perversely, this would deny stock options to non-professional staff and leave them intact for executives because the policy does not apply to salaried employees.

Amid public outcry, DOL has promised to review the policy. But can an agency so oblivious to the needs of workers be trusted to do so? Moreover, the Fair Labor Standards Act does not exempt stock options from base pay because stock options did not exist in 1938. Even if DOL retreats now, what's to stop them from destroying stock options in the future? Senator McConnell is crafting legislation to safeguard workers' stock options from DOL's blundering.

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